JUN 23 1956
HAROLD B. WILLEY, Clerk

No. 192

In the

Supreme Court of the United States

OCTOBER TERM, 1955

SYLVESTER WINFIELD,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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STATE OF TEXAS,

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OPINION CITATIONS

The opinions of the Court of Criminal Appeals of the State of Texas in this case have not yet been reported, either officially or unofficially. The opinions are appended in Appendix A, pp. 11-24.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 2nd day of November, 1955. (R., p. 291;

infra, p. 16.) Petitioners' first motion for rehearing was overruled, without written opinion, on the 18th day of January, 1956. (R., p. 304; infra, p. 16.) Petitioner's second motion for rehearing was overruled on the 4th day of April, 1956. (R., p. 322; infra, p. 18.) Petitioner then obtained an order staying the issuance of the mandate and all other proceedings upon the judgment against him, for a period of ninety days, pending his application to the Supreme Court of the United States for a writ of certiorari. (R., p. 333.) The jurisdiction of this court is invoked under *28 U. S. Code Annotated, Section 1257(3).*

QUESTIONS PRESENTED

The duty of the jury service is made mandatory for women, as a class, by the Constitution and Statutes of the State of Texas. *Query:* Did the Court of Criminal Appeals of the State of Texas err in holding that a male defendant may not complain of the arbitrary and intentional failure and refusal of the jury commissioners, in drawing the jury panel from which the jury in his case was chosen, to select or to consider women for jury service upon such panel?

STATUTES INVOLVED

The pertinent constitutional and statutory provisions are printed in Appendixes B, C, and D, infra, pp. 27-35. They are as follows:

Constitution of the United States:
Amendment XIV, Section 1.

Constitution of the State of Texas:

Article 5, Section 5;

Article 16, Section 19.

Statutes:

Revised Civil Statutes of the State of Texas:

Article 2104;

Article 2109;

Article 2110;

Article 2133;

Article 2134;

Article 2135.

Code of Criminal Procedure of the State of Texas:

Article 53.

STATEMENT OF THE CASE

On the 13th day of January, 1955, petitioner, Sylvester Winfield, was charged by complaint and information, filed in the County Court of Henderson County, Texas, with the offense of transporting intoxicating liquor in a dry area. For the purpose of enhancing the punishment in the case, the complaint and information also charged petitioner with the prior commission of an offense of like character. (R., pp. 6-9.) On the 18th day of February, 1955, after a trial before a jury, petitioner was found guilty and assessed the maximum punishment, to-wit, a fine of $2,000.00 and two years' confinement in the county jail. (R., p. 20.)

Petitioner filed a motion challenging the array of jurors, prior to his announcement of ready for trial. (R., pp. 10, 11, 20.) The motion alleged that the jury commissioners arbitrarily, deliberately, and intentionally excluded and discriminated against women, as a class, in the selection of persons for jury service, thereby denying petitioner the equal protection of the laws and due process of law, accorded to him by the 14th Amendment to the Constitution of the United States. (R., p. 10.) The motion was overruled, after hearing, and petitioner excepted. (R., pp. 11, 67-115.) Upon being tried before a jury, petitioner was found guilty and assessed a fine of $2,000.00 and two years' confinement in jail. (R., pp. 20, 21.) The action of the trial court in overruling petitioner's motion challenging the array was assigned as error in petitioner's amended motion for new trial. (R., p. 24.) The amended motion for new trial was overruled, whereupon petitioner in open court excepted and gave notice of appeal to the Court of Criminal Appeals of the State of Texas. (R., p. 31.) The Court of Criminal Appeals was the highest court in the state in which a decision of petitioner's cause could be had. Art. 5, Section 5, Constitution of the State of Texas (Appendix B, infra, p. 27); art. 53, Code of Criminal Procedure of the State of Texas (Appendix D, infra, p. 35.) Petitioner again raised the issue of the denial of his constitutional rights under the 14th Amendment, in his original brief and in his first and second motions for rehearing before the Court of Criminal Appeals. (R., pp. 251, 259-264, 296, 310-319.) The Court of Criminal Appeals dis-

cussed the constitutional questions raised by petitioner, in both its original opinion and in its opinion on petitioner's second motion for rehearing. (R., pp. 290, 291, 321-328; infra, pp. 11-24.) The judgment against petitioner is final. (R., p. 334; infra, pp. 24, 25.)

It is undisputed that the jury commissioners arbitrarily and intentionally failed to select and refused to consider women, in drawing the jury panel from which was selected the jury that tried and convicted petitioner. (R., p. 324; infra, p. 19.)

The jury commissioners were either informed by the county judge or already knew that women were legally entitled to serve as jurors. (R., pp. 74, 83, 93.) All of the commissioners admitted that they deliberately did not select any women on the panels. (R., pp. 74, 84, 98.) They all knew of women who were qualified to serve. (R., pp. 76, 89, 90, 95.) It was shown that about thirty-five to forty per cent. of the persons who paid poll taxes in Henderson County were women. (R., p. 101.) About twenty-five per cent. of the property rendered in the office of the County Tax Assessor and Collector was rendered in women's names. (R., p. 102.) A large number of women in Henderson County were legally qualified to serve and had expressed a desire to serve as jurors. (R., pp. 104, 105.) A jury, composed entirely of women, had previously served in the county court in which petitioner was tried. (R., p. 107.) A woman was selected to serve and did serve as a jury commissioner, in the *District* Court of Henderson

County, Texas, at the same time as the jury commissioners whose actions are complained of here. (R., p. 105.)

Furthermore, two of the jury commissioners expressed doubts that women were the equal of men, insofar as their qualifications as jurors were concerned. (R., pp. 78, 86, 90.) And these same two commissioners testified that they had voted against an amendment to the Constitution of the State of Texas, providing for jury service by women. (R., pp. 75, 85.)

REASONS FOR GRANTING THE WRIT

The Court of Criminal Appeals of the State of Texas has, in this case, decided a substantial and unsettled federal question arising under the Constitution of the United States.

In *Ballard v. United States, 329 U. S. 187, 91 L. ed. 181, 67 S. Ct. 261*, one of the petitioners was a man. The applicable state law made jury service by women permissive rather than obligatory. Nevertheless, the Supreme Court held, in the exercise of its power of supervision over the administration of justice in the federal courts, that it was reversible error to purposely and arbitrarily exclude women, as a class, from the jury panels in a United States District Court.

The Court of Criminal Appeals of the State of Texas asserts, in its majority opinion in the case at bar, that *Fay v. New York, 332 U. S. 261, 91 L. ed. 2043, 67 S. Ct. 1613*, limits the application of the rule of the *Ballard* case

to the federal courts. However, in the *Fay* case, women were on the general and special jury panels, and a woman served on the jury that convicted the petitioners. Moreover, the local law gave to women the privilege to serve but did not impose service as a duty.

In the instant case, no women were on the panel from which the jury that tried petitioner was selected. And Art. 16, Sec. 19, of the Constitution of the State of Texas makes jury service by women mandatory. The question as to whether the rule of the *Ballard* case applies to the selection of jurors in state courts thus remains unsettled.

As stated in *Thiel v. Southern Pacific Co., 328 U. S. 217, 90 L. ed. 1181, 66 S. Ct. 984:*

> " 'The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. * * * This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury'."

It is difficult to envisage a jury as representing a true cross-section of the community, when at least one-half of the eligible prospects for jury service—women—are intentionally excluded from serving, for "if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?" *Ballard v. United States*, supra.

The reasoning of the *Thiel* and *Ballard* cases should apply, therefore, with equal force, to the state courts. "Any other rule would permit the jury commissioners, upon their own agreement, or upon suggestion, to exclude any class not only upon the basis of sex, but because of political affiliation, religious belief, ancestry, occupation, or location of residence, and . . . the exclusion of not only one, but numerous classes from jury service." *Walter v. State, 208 Ind. 231, 195 N. E. 268.*

The Texas procedure for selecting jurors has come into question on several prior occasions in this court. *Carter v. Texas, 177 U. S. 442, 44 L. ed. 839, 20 S. Ct. 687; Smith v. Texas, 311 U. S. 128, 85 L. ed. 84, 61 S. Ct. 164; Hernandez v. Texas, 347 U. S. 475, 98 L. ed. 866, 74 S. Ct. 667.* [The pertinent statutory provisions, relating to the selection of the jury panels, are aptly summarized, in Judge Davidson's dissenting opinion. Appendix A, p. 23; R., p. 327.] The full text of the statutes is set forth in Appendixes C and D, infra, pp. 29-35.]

In *Hernandez v. Texas*, supra, it is stated that the Texas system of selecting petit jurors by the use of the jury commissions is fair on its face and capable of being used without discrimination. "But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable." *Smith v. Texas*, supra.

It is completely obvious, from an examination of the record in the instant case, that discriminatory practices were employed by the jury commissioners to exclude women, as a class, from the jury panels. This court has made its position entirely clear with regard to such practices in the *Ballard* case, but that case was not decided upon constitutional grounds. Petitioner submits that such discrimination should no more be permitted in the state courts than the federal courts. The discrimination complained of appears equally as offensive, whether viewed against the background of the proper administration of justice in the federal courts or the due process and equal protection clauses of the 14th Amendment.

This court has not heretofore had the opportunity to pass on the question presented. Because of the intimate connection it bears to the fundamental rights of the citizenry, petitioner maintains that it is of the greatest importance that the question be resolved by this court.

CONCLUSION

For reasons stated, it is respectfully submitted that this Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

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WM. WAYNE JUSTICE,
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Athens, Texas,
Counsel for Petitioner.

I hereby certify that three copies of this petition have been served upon the Attorney General of the State of Texas by mailing such copies, postage prepaid, to his office at Austin, Texas, this day of June, 1956.

REUBEN M. GINSBERG.

APPENDIX "A"

No. 27,770

SYLVESTER WINFIELD,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Henderson County

OPINION

The offense is transportation of intoxicating liquor in a dry area, with a prior conviction for an offense of like character alleged to enhance the punishment; the punishment, two years in jail and a fine of $2,000.00.

Assistant Chief of Police Baker of the City of Athens testified that he was driving along a highway outside the city limits of the City of Athens, which ran roughly parallel to the boundary line of the City, at approximately midnight when he observed a motor vehicle approaching him; that since the road was very narrow he pulled over on the shoulder and stopped; that the appellant, whom he recognized, passed in a pickup truck, and he observed a number of cardboard boxes which he suspected contained alcoholic beverages in the rear thereof; that he turned his

head and observed the pickup; that a moment or two after the pickup passed him the appellant turned off the lights of his truck and accelerated his speed; and that he then turned his automobile around and gave chase.

Baker testified that the chase continued for several miles; that it originated and ended outside the city limits of the City of Athens, and at no time did they enter the bounds of the city. When he brought the appellant to a halt he observed that the boxes in the rear of the pickup were cases of wine, beer, liquor and gin; that he arrested the appellant and took him and the intoxicants to the sheriff.

The prior conviction alleged was established.

Appellant did not testify in his own behalf and offered only witnesses on the question of the appointment of Baker as a deputy sheriff.

We shall discuss the questions raised by appellant's able counsel in his brief and argument.

Bill of exception No. 1 relates to the arrest by Officer Baker for an offense committed outside the limits of the City of Athens. Appellant relies upon Irwin v. State, 177 S. W. 2d 970. In that case the arrest and search were for the operation of a policy game, while the arrest in the case at bar was primarily for driving without lights. We quote from Officer Baker's testimony:

"Q. When you turned around, what did you do?

"A. I pursued him.

"Q. What caused you to *pick him up?*

"A. Because he turned off his lights."

He also testified that a minor reason for the arrest was his suspicion that the boxes in the rear of the pickup contained intoxicants.

In Hurley v. State, 234 S. W. 2d 1006, we had an identical situation to the one here presented except that the offense there involved was driving while intoxicated. Among the "preceding articles of this Chapter" mentioned in Article 803, V. A. P. C., upon which we relied in the Hurley case, is Article 798,V. A. P. C., which denounces the offense of operating a motor vehicle upon a public highway at night without lights.

We perceive no irreconcilable conflict between Article 798 and Section 2 of Article 6701c which would operate as a repeal of the former act.

Under the authority of the Hurley case, we have concluded that Officer Baker was authorized to arrest the appellant under the facts herein set forth. Having so concluded, we do not deem it necessary to pass upon the extent of Baker's authority under Article 666-24, V. A. P. C., or the question of whether or not he might legally be both a city policeman and a deputy sheriff.

We are not unmindful of the possibilities of abuse of authority which appellant's counsel argues so forcefully may result from this decision, but we feel that we are bound by the acts of the Legislature and the prior decisions of this Court.

Bill of exception No. 3 is directed at an alleged reference to the appellant's failure to testify which occurred while the county attorney was interrogating Officer Baker. We quote from the bill:

> "Mr. Hardee (State's Attorney): What happened, if anything, when you stopped him on Highway 19?
>
> "A. I walked back to where he was and asked him why he was driving so fast.
>
> "Mr. Justice (Attorney for defendant): We object, on the basis that when this man stopped the defendant, he had him under arrest.
>
> "Mr. Hardee; May I say something, your honor; that is the only evidence we have here is his testimony that he did not arrest.
>
> "Mr. Justice: Now, if the court please, we ask that you declare a mistrial of this case, on the basis that he commented on defendant's failure to testify, and ask a mistrial."

The bill recites that, following this, the county attorney said, "I would like to say something else; I have not mentioned anything about the defendant not testifying."

Normally, a reference to the defendant's failure to testify occurs during the argument of an inexperienced prosecutor. The above colloquy occurred during the examination of a witness.

Appellant relies upon two cases which also fit this unusual situation.

In Biggerstaff v. State, 68 S. W. 2d 498, we reversed a conviction, among other reasons, because the prosecutor, while cross-examining a defense witness, asked several

questions of which the following is typical: "If you were charged with having sold me half a gallon of whisky in this court before this jury, do you know of anybody that could tell that jury better than you could whether you sold it to me or not?"

We held that these questions necessarily called the jury's attention to the failure of the accused to testify.

In Heeter v. State, 281 S. W. 565, we reversed a conviction, among other reasons, because the prosecutor, while examining a witness and when interrupted by the State's objection, said, "This defendant is here; if he wants to testify . . ."

We would not be inclined to extend the holdings in the above cases and feel that an extension would be required to hold that the statement to the court set out above constituted a comment upon the defendant's failure to testify.

Appellant's remaining contentions relate to alleged discrimination in the selection of the panel from which he was required to select the jury that tried him. The sole basis of discrimination urged grows out of the failure of the jury commissioners to select women on the panel. Appellant concedes that he is not a member of the class which he alleges was discriminated against in this case but urges us to hold that any discrimination, if shown, would vitiate the panel.

We need not pass upon the question of whether the examination of the jury commissioners showed that they discriminated against women because it has been the

consistent holding of this Court that an accused might not urge discrimination against a class of which he is not a member. Alexander v. State, 274 S. W. 2d 81. See also 9 A. L. R. 2d 661.

Finding no reversible error, the judgment of the trial court is affirmed.

MORRISON, Presiding Judge

(Delivered November 2, 1955)

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

No. 27,770

SYLVESTER WINFIELD,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Henderson County

APPELLANT'S FIRST MOTION FOR REHEARING OVERRULED WITHOUT WRITTEN OPINION JANUARY 18, 1956

This cause came on to be heard on Appellant's First Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

No. 27,770

SYLVESTER WINFIELD,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Henderson County

OPINION ON APPELLANT'S SECOND MOTION FOR REHEARING

Following our original opinion in Rogers v. State, No. 27,819, appellant, relying upon such decisions, filed his second motion for rehearing hereon.

Appellant in an able brief takes us to task for that portion of our original opinion in which we held that the appellant, being a man, might not complain because of the discrimination against women in the selection of the jury which tried him. In Rogers v. State, supra (this day affirmed on rehearing), we discussed this question fully. The date of the trial in the instant case was even earlier than that of the Rogers trial.

Appellant relies upon Ballard v. U. S., 329 U. S. 187, 9 L. ed. 181. It should be noted that after the rendition of the Ballard case the Supreme Court of the United States in Foy [sic] v. N. Y., 332 U. S. 261, 91 L. ed. 2043, has limited the rule in the Ballard case to the Federal courts.

It will be seen from the annotation cited in the original opinion that the great weight of authority in State court cases support the conclusion we reached. In fact, we find that the Supreme Courts of California, Massachusetts, New Jersey, Tennessee, Missouri, North Carolina, South Carolina, Delaware, Florida, Wyoming, Louisiana, Arkansas, Kansas and Oklahoma all hold with the conclusions we have here reached. Only one State (Indiana) holds with the appellant.

We conceive it our duty, unless very strong circumstances impel us to do otherwise, to hold with the great weight of authority.

As we said in the Rogers case, our holding herein is not to be construed as condoning any arbitrary disregard of the constitutional mandate which imposes upon women as a class the inescapable duty of jury service.

Remaining convinced that we properly disposed of this cause originally, appellant's second motion for rehearing is overruled.

Morrison, Presiding Judge

(Delivered April 4, 1956).

No. 27,770

SYLVESTER WINFIELD, Appellant,

v.

THE STATE OF TEXAS, Appellee.

Appeal from Henderson County

DISSENTING OPINION ON APPELLANT'S SECOND MOTION FOR REHEARING

That the jury commissioners, in drawing the jury panel from which was selected the jury that tried and convicted the appellant, arbitrarily and intentionally failed to select and refused to select or consider women for jury service on that panel is not disputed.

In sustaining the action of the trial court in overruling appellant's challenge to the array, my brethren do so upon the proposition that appellant—being a male person and not a member of the class which was discriminated against—could not complain of a denial of equal protection to women in the selection of the jury. In other words, what my brethren hold is that a male defendant may not complain of the arbitrary and intentional failure and refusal of the jury commissioners, in drawing the jury panel from which the jury in this case was selected, to select women as jurors or to consider women qualified for jury service upon such panel.

To such holding I cannot and do not agree. I am of the opinion that the question here presented is one involving

not only a violation of equal protection but also a denial of due process of law and a wilful and intentional disregard of the statute law of this state.

Under the holding of my brethren, one half of all the available jurors in the county may be purposely and intentionally excluded from jury service and a male defendant could not complain thereof.

If such be true, then we would no longer have prescribed standards of jury selection or service in this state. If jury commissioners can exclude women, as a class, from jury service, then they may exclude others who are members of some established class or nationality in the county. Of such conduct, only those who are members of the excluded class could complain. By such conduct, our jury system might be completely destroyed, because an accused would be denied a fair and impartial jury.

In my opinion, the case of Ballard v. United States, 329 U. S. 187, 91 L. Ed. 181, directly supports appellant's contention here and also supports this dissent.

In that case, a woman and her son were indicted by a federal grand jury composed exclusively of men and from which women had been intentionally excluded. The indictment was dismissed because of the conclusion: "That the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress had adopted and that, as in the Thiel case, we should exercise our power of supervision over the administration of justice in the federal

courts, McNabb v. United States (U. S.) supra, to correct an error which permeated this proceeding."

The reference there was to the act of Congress by which the qualification of jurors in the federal court was the same as that prescribed by the state law. In other words, Congress referred to state law for a determination of the question as to what persons are qualified to serve on the juries in the federal courts.

One of the petitioners in the Ballard case was a woman. In dismissing the indictment against her, because of the intentional exclusion of women from the jury panel, the court—of necessity—refused to restrict equal protection only to those of the class discriminated against. The court made it clear that its ruling in the Ballard case was an exercise of its power of supervision over the administration of justice in the federal court, to exemplify which the court quoted from Thiel v. Southern Pacific Co., 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, as follows:

> " 'The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual

> rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.' "

Regardless of whether there has occurred a violation of constitutional provisions or of statutory law, the fact remains that the court was there requiring that the American tradition of trial by jury—which necessarily contemplates that an impartial jury be drawn from a cross-section of the county—must be maintained.

Such is the reasoning I would apply here.

As shown by the Ballard and Thiel cases, the Supreme Court of the United States has protected federal juries against arbitrary conduct and exclusion and discrimination by administrative officers in the selection of jury panels.

If the Supreme Court should exercise such control over federal juries, why should this court refuse to exercise the same control over the selection of juries in this state? To my mind, the obvious answer is that it should not so refuse.

My brethren say that the holding in the Ballard case has been limited by Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043.

As pointed out in the Fay case, the facts there were distinguished in vital and obvious particulars from those of other cases, including the Ballard case. It is necessary only to point out in the Fay case that women were on the general and special jury panel, and one woman served on the jury that convicted the petitioners.

There was, then, no arbitrary exclusion of women, as a class, from the jury panel such as exists here and such as existed in the Ballard case.

I pass now in a discussion of the question in the light of the decisions of this court and the statutes of this state.

Art. 16, Sec. 19, of the Constitution of this state places upon the legislature the duty of prescribing the qualifications for jury service. In the exercise of that mandate, the legislature, by Art. 2133, R. C. S., as amended, has provided that "All persons both male and female over twenty-one (21) years of age ar competent jurors, unless disqualified under some provision of this chapter." The statute then sets forth the requisite qualifications for jury service.

Art. 2134, R. C. S., sets forth the disqualifications for jury service. Art. 2135, R. C. S., as amended, designates those who are not liable for jury service.

The legislature also provided for the drawing and selection of jury panels by jury commissioners (Arts. 2104 and 2109, R. C. S.) and, by Art. 2110 R. C. S., has required of the jury commissioners that the jury panel be selected "from the citizens of the different sections of the county, liable to serve as jurors . . ."

Being "liable to serve as jurors," women, of necessity must be given consideration for jury service by the jury commissioners if the mandate of the statute is to be obeyed.

There is no escape from the conclusion that when the jury commissioners, here, intentionally refused to consider women liable for jury service they violated the express

mandate of the statute mentioned. So, whether the action of the jury commissioners be called a denial of due process or of equal protection, or the arbitrary disobedience of a statutory mandate, the fact remains that this defendant was denied the right to be tried by a jury drawn and empaneled in accordance with law.

The arbitrary refusal to allow the statute law of this state relative to the selection of a jury constitutes reversible error of and within itself. Newberry v. State, 140 Tex. Cr. R. 186, 143 S. W. 2d 962; Fann v. State, 140 Tex. Cr. R. 142, 143 S. W. 2d 963; Logan v. State, 154 Tex. Cr. R. 164, 226 S. W. 2d 121.

I am convinced that in this case the appellant has not only been denied a trial in accordance with due process of law but, in addition thereto, has been denied a trial in accordance with the laws of this state.

I respectfully dissent from the affirmance of this case.

Davidson, Judge

(Delivered April 4, 1956).

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

JUDGMENT

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that Cause No. 27,770

SYLVESTER WINFIELD

v.

THE STATE OF TEXAS

was affirmed by this court on November 2, 1955; Appellant's First motion for Rehearing overruled, without written opinion, January 18, 1956; Appellant's Second Motion for Rehearing overruled April 4, 1956, and Order Staying Mandate to Permit Application for Writ of Certiorari to The Supreme Court of the United States issued and filed April 5, 1956.

THEREFORE, this case was disposed of by this Court with the overruling of Appellant's Second Motion for Rehearing and mandate would have issued if appellant had not filed motion to stay mandate so that application for Writ of Certiorari could be filed in The Supreme Court of the United States.

With the overruling of Appellant's Second Motion for Rehearing, appellant has exhausted all remedy in this court, and said judgment has become final on the docket of this court.

WITNESS my hand and seal of said court, at office in Austin, Texas, this 4th day of May, A. D. 1956.

(signed) Glenn Haynes

Clerk, Court of Criminal Appeals

APPENDIX "B"

CONSTITUTION OF THE UNITED STATES

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF TEXAS

Article 5, Section 5:

The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law.

The Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. The Court of Criminal Appeals shall have power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. The Court of Criminal Appeals shall sit for the transaction of business from the first Monday in October to the last Sat-

urday of June in each year, at the State capital and two other places (or the capital city) if the Legislature shall hereafter so provide. The Court of Criminal Appeals shall appoint a clerk for each place at which it may sit and each clerk shall give bond in such manner as is now or may hereafter be required by law, and who shall hold his office for four years unless sooner removed by the court for good cause entered of record on the minutes of said court.

Article 16, Section 19:

The Legislature shall prescribe by law the qualifications of grand and petit jurors; provided that neither the right nor the duty to serve on grand and petit juries shall be denied or abridged by reason of sex. Whenever in the Constitution the term "men" is used in reference to grand or petit juries, such term shall include persons of the female as well as the male sex.

APPENDIX "C"

REVISED CIVIL STATUTES OF THE STATE OF TEXAS

Article 2104:

The District Judge shall at each term of the District Court appoint not less than three (3), nor more than five (5) persons to perform the duties of Jury Commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. Such Commissioners shall receive as compensation for each day or part thereof they may serve as such Commissioners, the sum of Four Dollars ($4), and who shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write.

2. Be qualified jurors and freeholders in the county.

3. Be residents of different portions of the county.

4. Have no suit in said Court which requires the intervention of a jury.

5. The same person shall not act as Jury Commissioner more than once in the same year.

Article 2109:

The County court shall, at its first term after the last day of December and the last day of June of each year, appoint three jury commissioners for said court, having the same qualifications as jury commissioners for the district

court. The same proceedings shall be had in the county court by its officers and said commissioners to procure jurors as are required by this title for similar proceedings in the district court, except as modified by the provisions of this article.

1. Oath.—The oath to be administered to said commissioners shall be: "You swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as a juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, communicate with any one selected by you as a juryman concerning the merits of any case to be tried by this court within the next six months, until said case shall have been tried or otherwise disposed of."

2. To select jurors.—Said commissioners shall select jurors for all the terms of the county court to be held within six months after the adjournment of the first week of said court after the dates first named. The county judge shall designate the number of jurors to be so selected for each term and week.

Article 2110:

The jury commissioners shall select from the citizens of the different portions of the county, liable to serve as jurors, one hundred persons, or a greater or less number if so directed by the court, free from all legal exceptions of good moral character, of sound judgment, well-informed,

and, so far as practicable, able to read and write, to serve as petit jurors at the next term, if in the district court, and for the next six months, if in the county court, and shall write the names of such persons on separate pieces of paper, as near the same size and appearance as may be, and fold the same so that the names cannot be seen.

Article 2133:

All persons both male and female over twenty-one (21) years of age are competent jurors, unless disqualified under some provision of this chapter. No person shall be qualified to serve as a juror who does not possess the following qualifications:

1. He must be a citizen of the State and of the County in which he is to serve, and qualified under the Constitution and Laws to vote in said County; provided, that his failure to pay poll tax as required by law shall not be held to disqualify him for jury service in any instance.

2. He must be of sound mind and good moral character.

3. He must be able to read and write, except as otherwise provided herein.

4. He must not have served as a juror for six (6) days during the preceding six (6) months in the District Court or during the preceding three (3) months in the County Court.

5. He must not have been convicted of felony.

6. He must not be under indictment or other legal accusation of theft or of any felony.

7. He must be either a freeholder in the State of Texas or a householder in the County or wife of a householder in the County.

Whenever it shall be made to appear to the Court that the requisite number of jurors able to read and write cannot be found within the County, the Court may dispense with the exception provided for in the third subdivision; and the Court may in like manner dispense with the exception provided for in the fourth subdivision, when the County is so sparsely populated as to make its enforcement seriously inconvenient.

Where the word "he" is used in this Section it shall be used in the generic term so as to include both male and female persons.

Article 2134:

The following persons shall be disqualified to serve as jurors in any particular case:

1. Any witness in the case.

2. Any person interested, directly or indirectly, in the subject matter of the suit.

3. Any person related by consanguinity or affinity within the third degree to either of the parties to the suit.

4. Any person who has a bias or prejudice in favor of or against either of the parties.

5. Any person who has sat as a petit juror in a former trial of the same, or of another case, involving the same question of fact.

Article 2135:

All competent jurors are liable to jury service, except the following persons:

1. All persons over sixty-five (65) years of age.

2. All civil officers of this State or the United States.

3. All overseers of roads.

4. All ministers of the gospel engaged in the active discharge of their ministerial duties.

5. All physicians, dentists, and attorneys and spouses of attorneys engaged in actual practice.

6. All railroad station agents, conductors, engineers and firemen of railroad companies when engaged in the regular and actual discharge of their respective positions.

7. Any person who has acted as a jury commissioner within the preceding twelve (12) months.

8. All members of the national guard of this State under the provisions of the title "Militia" during periods of time when they are actually on active duty.

9. In cities and towns having a population of one thousand (1,000) or more inhabitants, according to the last preceding United States Census, the active members of organized fire companies, not to exceed twenty (20) to each one thousand (1,000) of such inhabitants.

10. All females who have legal custody of a child or children under the age of sixteen (16) years.

11. All registered, practical and vocational nurses actively engaged in the practice of their profession.

12. Any practitioner who treats the sick by prayer or spiritual means in accordance with the tenets, teachings or practice of any well established church or denomination, or a nurse who cares for the sick who are under treatment by such spiritual means, or a reader whose duty is to conduct regular religious services of such church or denomination.

13. All licensed morticians who are actively engaged in the practice of their profession.

14. All registered pharmacists who are actively engaged in the practice of their profession.

15. Agents and patrolmen engaged in forestry protection work employed by the State Department of Forestry when engaged in the actual discharge of their duties.

16. The wife of any man who is summoned to serve on the same jury panel.

APPENDIX "D"

CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS

Article 53:

The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars.